

THE EMERGENCY ARBITRATION PROCESS UNDER THE SIAC RULES 2016

A Comparison with Court-ordered Interim Measures under s 12A of the International Arbitration Act 1994

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I. Introduction

1 The emergency arbitrator provisions in Schedule 1 of the Singapore International Arbitration Centre Rules 2016¹ (the “SIAC Rules”) were first introduced in 2010 to address situations where a party who has commenced arbitration in the Singapore International Arbitration Centre (“SIAC”) requires urgent interim relief prior to the appointment of the tribunal. With great foresight, SIAC was the first international arbitral institution based in Asia to make such an emergency arbitration process available to parties.² Indeed, the emergency arbitration process has proved itself to be of great utility to parties – even in its infancy, from the time it was first introduced in 2010 to the end

1 6th Ed, 1 August 2016.

2 Vivekanada N, “The SIAC Emergency Arbitrator Enforcement Experience” *National Forum for Research in Arbitration Law* (16 September 2020) <<https://www.nfral.in/media/post/pdf/siac-experience-pdf-1623600714.pdf>> (accessed 2 March 2023).

of 2014, a record number of 42 applications for an emergency arbitrator to be appointed were received by the SIAC.³

2 The introduction of the emergency arbitrator provisions was a welcome development. Upon the commencement of arbitration, it usually takes some time for the tribunal to be constituted, hear the substantive dispute, and thereafter issue a final award. The emergency arbitration process allows parties who have urgent concerns (arising before the constitution of the tribunal) to have them addressed in a significantly shorter span of time by an emergency arbitrator.

3 The emergency arbitration provisions are complemented by s 12(6) of the International Arbitration Act 1994⁴ (the “IAA”), which provides for the enforceability of “[a]ll orders or directions made or given by an arbitral tribunal”. Back in 2012, the definition of “arbitral tribunal” in s 2 of the IAA was extended to expressly include “an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation”.⁵ Therefore, there is no doubt that emergency arbitration awards in the SIAC are enforceable in Singapore.

4 While the emergency arbitration provisions already provide an avenue for parties to obtain urgent interim relief, the IAA also contains a parallel regime for parties to obtain court-ordered interim measures in support of arbitration. Section 12A of the IAA provides that the High Court shall have powers to grant interim relief to parties, but it should be highlighted that this is only “if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively”.⁶ Indeed, there remain certain inherent

3 Singapore International Arbitration Centre, “The Emergency Arbitrator and Expedited Procedure in SIAC: A New Direction for Arbitration in Asia” *In-House Community* <<https://www.inhousecommunity.com/article/the-emergency-arbitrator-and-expedited-procedure-in-siac-a-new-direction-for-arbitration-in-asia/>> (accessed 2 March 2022).

4 2020 Rev Ed.

5 International Arbitration (Amendment) Bill (Bill 10 of 2012) para 2.

6 International Arbitration Act 1994 (2020 Rev Ed) s 12A(6).

limitations in the emergency arbitration process, which requires parties to turn to the court instead of the emergency arbitrator for relief in certain situations.

5 In this article, the authors explore some of the key differences between urgent interim relief obtained through the emergency arbitration process in the SIAC and court-ordered interim measures under s 12A of the IAA.

II. Time taken to obtain interim relief

6 When a party has urgent concerns that need to be addressed, the time taken to obtain interim relief is an especially important consideration. In this regard, the time taken to obtain urgent interim relief from an emergency arbitrator is generally longer than that required to obtain urgent interim relief from the court.

7 The emergency arbitration process begins when a party makes an application for emergency interim relief under r 30.2 and Schedule 1 of the SIAC Rules and pays the requisite administration fee and deposits.⁷ If the president of the SIAC determines that the SIAC should accept the application, he will seek to appoint an emergency arbitrator within one day.⁸ Thereafter, within two days of the appointment, the emergency arbitrator will establish a schedule for consideration of the application.⁹ Given that there is no *ex parte* process, the emergency arbitrator has to hear from both sides¹⁰ and may invite both sides to file written submissions and replies thereto. There may be at least one round of exchanges, which suggests that a hearing may only be convened after a few days have elapsed.

7 Singapore International Arbitration Centre Rules (6th Ed, 1 August 2016) Schedule 1, para 2.

8 Singapore International Arbitration Centre Rules (6th Ed, 1 August 2016) Schedule 1, para 3.

9 Singapore International Arbitration Centre Rules (6th Ed, 1 August 2016) Schedule 1, para 7.

10 Singapore International Arbitration Centre Rules (6th Ed, 1 August 2016) Schedule 1, para 7.

8 After the hearing, the emergency arbitrator will require time to deliberate on the parties' submissions and prepare the interim order or interim award (the "EA Award"). Thereafter, the EA Award can only be issued after the Registrar of the SIAC has approved the same as to its form.¹¹ An application for emergency interim relief thus takes up to two weeks to complete.¹²

9 In contrast, an application under s 12A of the IAA for a court-ordered interim measure is much more streamlined. Order 48 r 3(3) of the Rules of Court 2021 provides that where the case is one of urgency, an application for interlocutory orders or directions under s 12A of the IAA may be made "without notice on such terms as the Court thinks fit". Given that there is no need for filing of detailed submissions and replies thereto by both parties in an *ex parte* application (*ie*, the court only has to hear from the applicant), an urgent hearing date can usually be obtained within a day or two after the application is first made, and the judge hearing the application can make an order for the purpose of preserving evidence or assets at the conclusion of the hearing itself.¹³

III. Consequences of an order for interim relief

10 When a party seeks urgent interim relief, it is important that the order obtained carries real and immediate consequences that would compel the counterparty to abide by the order.

11 Paragraph 12 to Schedule 1 of the SIAC Rules provides that "[t]he parties agree that an order or Award by an Emergency Arbitrator pursuant to this Schedule 1 shall be binding on the parties from the date it is made, and undertake to carry out the interim order or Award immediately and without delay". However, if the party against whom an EA Award is made chooses not to abide by the EA Award, such disobedience does not carry

11 Singapore International Arbitration Centre Rules (6th Ed, 1 August 2016) Schedule 1, para 9.

12 Singapore International Arbitration Centre Rules (6th Ed, 1 August 2016) Schedule 1, para 9.

13 International Arbitration Act 1994 (2020 Rev Ed) s 12A(4).

with its consequences of contempt until permission is obtained from the court to enforce the EA Award and enter judgment in terms of the EA Award under s 12(6) of the IAA. This poses a hurdle for parties who wish for an EA Award made in their favour to have a real “bite”.

12 Therefore, if the party in whose favour the EA Award is made wants the EA award to have a real “bite”, the party would first need to go through the cost and expense of an application under s 12(6) of the IAA. Time is also needed to obtain the said permission under s 12(6) of the IAA. Such an application for permission to enforce an EA Award is generally *inter partes*, though it may be done *ex parte* where the case is one of urgency.¹⁴

13 Section 12(6) of the IAA provides as follows:

All orders or directions made or given by an arbitral tribunal in the course of an arbitration are, by permission of the General Division of the High Court, enforceable in the same manner as if they were orders made by a court and, where permission is so given, judgment may be entered in terms of the order or direction.

14 The process for obtaining permission to enforce an EA Award under s 12(6) of the IAA is generally a mechanistic one. While there is no explicit authority on the threshold for granting permission under s 12(6) IAA of the IAA, the authors of *Singapore Civil Procedure* opine that “the supervisory court ought to as a matter of course exercise its discretion to enforce an interim order issued by an arbitral tribunal, unless there are strong and clear reasons not to do so”.¹⁵

15 Such a standard would also be consistent with the policy of “minimum curial intervention” emphasised by the High Court in *PT Pukuafu Indah v Newmont Indonesia Ltd*¹⁶ (“Pukuafu”). In *Pukuafu*, the High Court noted that such interim orders are not

14 Rules of Court 2021, O 48 r 3(3).

15 *Singapore Civil Procedure* vol 1 (Cavinder Bull gen ed) (Sweet and Maxwell, 2021) at para 69A/5/4.

16 [2012] 4 SLR 1157.

subject to applications for setting aside under the IAA.¹⁷ The High Court also observed that the court’s role was limited to ensuring the enforceability of such orders:¹⁸

22 ... Parliament has chosen the approach of minimal curial intervention by insulating these orders from judicial challenge while simultaneously lending the coercive powers of the court to the enforceability of the orders – the pendulum swings between independence and interventionism, but the overarching aim is always to facilitate the efficiency of arbitration. The issue of whether interlocutory orders may be subject to judicial challenge is simply another manifestation of the perennial debate over the role that courts should play in arbitration; and under the IAA, the scales have come down firmly in favour of independence in the ongoing conduct of arbitral proceedings.

16 Notwithstanding that the courts adopt a policy of minimal curial intervention when it comes to the enforcement of an EA Award, the court in *Pukuafu* noted that “the possibility of refusing leave could provide some measure of residual protection for the rights of both parties”.¹⁹ While the court in *Pukuafu* ultimately left open the issue of what some of the grounds for refusing leave for enforcement would be,²⁰ this reminds parties that permission to enforce an EA Award is ultimately subject to the discretion of the court, posing yet another hurdle for parties who wish for an EA Award made in their favour to have a real “bite”.

17 In contrast, a court-ordered interim measure carries with it consequences of contempt right from the outset, should the party against whom the court order is made choose not to obey it.

IV. Effect of an interim order on third parties

18 A court-ordered interim measure under s 12A of the IAA can be said to have more “force” than an EA Award, given its ability to bind third parties. The legal effect of arbitral awards,

17 *PT Pukuafu Indah v Newmont Indonesia Ltd* [2012] 4 SLR 1157 at [19].

18 *PT Pukuafu Indah v Newmont Indonesia Ltd* [2012] 4 SLR 1157 at [22].

19 *PT Pukuafu Indah v Newmont Indonesia Ltd* [2012] 4 SLR 1157 at [27].

20 *PT Pukuafu Indah v Newmont Indonesia Ltd* [2012] 4 SLR 1157 at [27].

on the other hand, is generally limited to binding the parties to the arbitration.

19 For instance, if the urgent interim relief that the claimant seeks is an order prohibiting the respondent from dissipating his assets to frustrate the enforcement of any final award, and such relief is obtained from the court in the form of a Mareva injunction under s 12A of the IAA, it would be open to the applicant to circulate the Mareva order to the respondent's banks to inform them of the same. To this end, it is a contempt of the court for any person notified of the Mareva order to knowingly assist in or permit a breach of the order, and this would usually be explicitly stated within the order itself.²¹

20 On the other hand, if such interim relief is sought from an emergency arbitrator, the EA Award would not have immediate legal effect on third parties. It would not amount to a contempt of court *per se* for a third party to assist in or to permit a breach of the EA Award. For an EA Award to have the same legal effect as a court judgment, the applicant will have to first apply to court for permission to enter judgment in terms of the EA Award under s 12(6) of the IAA.

21 Further, a party who successfully obtains interim relief in arbitration would face issues of confidentiality when he attempts to convey the content of the award to third parties to enforce the same. Rule 39.1 of the SIAC Rules provides that “unless otherwise agreed by the parties, a party ... shall at all times treat all matters relating to the proceedings and the Award as confidential”. While a claimant is arguably permitted to rely on the exception in r 39.2(c) of the SIAC Rules (which states that disclosure can be made “for the purpose of pursuing or enforcing a legal right or claim”) the ambit of this exception remains unclear,²² and

21 See O 13 rr 1(6)–1(7), para 8 of Form 24 (Injunction Prohibiting Disposal of Assets in Singapore) and para 8 of Form 25 (Injunction Prohibiting Disposal of Assets Worldwide) of the Rules of Court 2021.

22 See, *eg*, Paul Sandosham *et al*, *A Practical Guide to the SIAC Rules* (LexisNexis, 2018) at para I.54, where the authors considered this exception to the rule of confidentiality and opined that “on its face, the provision appears to be extremely wide in scope, and may potentially prove fertile ground for disputes over interpretation”.

confidentiality would always remain an additional factor which a party who obtains interim relief from an emergency arbitrator would have to consider. These considerations do not apply with similar force to a party who obtains interim relief from the court.

V. Conclusion

22 Parties choose to resolve their disputes, especially cross-border disputes, via arbitration because of its many benefits – flexibility, confidentiality, enforceability of awards in foreign jurisdictions, simplified rules of evidence and procedure, and much more. However, when it comes to obtaining urgent interim relief pending the resolution of the dispute on its merits, the relief obtained via the emergency arbitration procedure in the SIAC has many material differences when compared to the interim relief that a court can order under s 12A of the IAA. The differences in the time taken to obtain interim relief, the consequences of an order for interim relief, and the effect of such an order on third parties are all pertinent issues that an applicant has to consider. As highlighted above, where a party requires *ex parte* relief, or relief against third parties, an application to court under s 12A of the IAA may be preferred, and such situations would likely be one where the applicant can satisfy the preliminary requirement in s 12A(6) of the IAA that the arbitral tribunal or person vested by the parties with power in that regard “has no power or is unable for the time being to act effectively”.

23 These differences in the two mechanisms make it all the more important for a party seeking urgent interim relief to make its decisions carefully and strategically, when deciding whether to turn to an emergency arbitrator or the court for relief.